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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY RAY TAYLOR,

Defendant and Appellant.

B211369

(Los Angeles County
Super. Ct. No. BA317009)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Anne H. Egerton, Judge. Affirmed.

Robert M. Sweet, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Anthony Ray Taylor appeals from a judgment entered after a jury convicted him of count 1, assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))¹ and count 2, possession of marijuana (Health & Saf. Code, § 11357, subd. (b)).

On May 24, 2007, the jury returned a verdict of guilt against defendant on count 2, but deadlocked on count 1. The trial court imposed a \$100 fine on defendant and credited him \$100 for spending four days in jail.

On September 27, 2007, a second jury returned a verdict of guilt against defendant on the retrial of count 1. The jury found true the allegation that defendant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The jury found not true the allegation that the offense was a hate crime within the meaning of section 422.75, subdivision (b). Defendant admitted that he had two prior convictions within the meaning of section 667.5, subdivision (b).

The trial court sentenced defendant to a state prison term of eight years consisting of the midterm of three years on count 1, plus an additional three years pursuant to section 12022.7, subdivision (a), and an additional year for each of the two prior convictions pursuant to section 667.5, subdivision (b). The trial court set aside the jury conviction on count 2 and vacated its original sentence.

Defendant contends that the trial court erred in denying his motion made pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) prior to his retrial on count 1. We disagree and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

On February 9, 2007, around 10:50 p.m., William Traylor (Traylor) was severely beaten by defendant and others in the parking lot of a Burger King restaurant. Two witnesses ran to help Traylor. Defendant left the scene, then came back and tried to get Traylor to leave. When one of the witnesses tried to call an ambulance on his

¹ All further statutory references are to the Penal Code unless otherwise indicated.

cell phone, defendant told him not to call the police, grabbed the cell phone, and ran off. Defendant then returned to the beating scene and threw the cell phone into the street. The witness was able to summon aid. Defendant and his brother, codefendant Jovan Taylor (Jovan), were apprehended and subsequently charged with assault by means likely to produce great bodily injury and possession of marijuana.² The two witnesses positively and unequivocally identified defendant as the assailant at a field showup, at the preliminary hearing, and at trial.

Defendant's trial counsel represented him in both trials. At the preliminary hearing, defendant's trial counsel successfully made a motion to dismiss a charge for dissuading a witness based on insufficient evidence. On June 21, 2007, after the mistrial on count 1, based on an 11 to 1 deadlock in favor of finding defendant guilty, defendant's trial counsel stated that he believed defendant should accept the People's plea offer of five years. Prior to trial, the People had offered seven years. Defense counsel stated that after the first trial, he realized the People had a very strong case against defendant. Defense counsel then stated that defendant did not want him to continue to represent him. The trial court explained to defendant that his trial counsel was very competent and that the potential sentence was 13 years for defendant and 19 years for Jovan. The People stated that both men had to plead guilty as a package deal. Neither man was willing to accept the offer.

Defendant's trial counsel indicated that defendant wanted to make a *Marsden* motion, at which point defendant stated "I don't want this man as my lawyer." Out of the presence of the prosecutor, the trial court conducted a *Marsden* hearing. When asked to state legal grounds for removing his attorney and appointing another lawyer, defendant stated that he was unhappy with his lawyer for trying to persuade him to

² Jovan is not a party to this appeal. He was convicted in the first trial of count 2, possession of marijuana in violation of Health & Safety Code section 11357, subdivision (b). The jury deadlocked as to Jovan on count 1 in the second trial. The trial court declared a mistrial and dismissed him on the People's motion.

take a plea bargain and that he was not happy with being represented by him. In response to the trial court's question "What would you like him to do?" defendant claimed that the matter should have been dismissed pursuant to section 871 because there was insufficient evidence linking him to the crime. The trial court explained that the magistrate had held defendant and his brother to answer and that the denial of the section 995 motion was proper. The trial court denied defendant's *Marsden* motion.

When the prosecutor returned, the trial court informed defendant he would be given time to retain a lawyer if he preferred. The trial court stated that it would put the matter over to July 10, 2007, and would give defendant 21 days after that to retain a lawyer. Defendant's trial counsel then stated "Would the court consider 28 days?" After the trial court agreed, defendant's trial counsel said "I am real nervous."

Following the verdict in the second trial, defendant made another *Marsden* motion on October 30, 2007, that was denied by the trial court after defendant was unable to provide specific names of persons he believed should have been called in his defense. The trial court granted defendant's request for self-representation for the sentencing hearing pursuant to *Faretta v. California* (1975) 422 U.S. 806.

DISCUSSION

The trial court did not abuse its discretion in denying defendant's *Marsden* motion

Defendant urges that the trial court abused its discretion in denying his *Marsden* motion because (1) the trial court only briefly questioned defendant about the "legal reasons" why he should be given substitute counsel; (2) the trial court failed to question defendant's defense counsel about his commitment to vigorously and effectively defend defendant in the second trial; and (3) there was an irreconcilable conflict between defense counsel and defendant because defense counsel believed defendant was guilty and stated that he was "real nervous" that the matter was going to proceed to trial. We are not persuaded by defendant's arguments.

Substitute counsel should be appointed under the *Marsden* standard when the trial court finds in its discretion that the defendant has shown that a failure to replace

the appointed attorney would substantially impair the right to assistance of counsel. (*People v. Smith* (1993) 6 Cal.4th 684, 696.) That is, the defendant must show that the first appointed attorney was not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*Ibid.*) To the extent there is a credibility issue between defendant and counsel at the hearing, the trial court is entitled to accept counsel's explanation. (*Ibid.*)

Here, the record fails to show that defendant's trial counsel was providing inadequate representation or that defendant and his counsel became embroiled in such an irreconcilable conflict that ineffective representation was likely to result. The trial court adequately and properly inquired into defendant's reasons for requesting substitute counsel. Defendant failed to state any legal grounds for his dissatisfaction, merely stating that he was unhappy with his lawyer for trying to persuade him to take a plea bargain. In response to the trial court's request for further details, defendant claimed that there was insufficient evidence linking him to the crime. But, the trial court explained that the magistrate had held defendant and his brother to answer and that the denial of the section 995 motion was proper.

The record also shows that defendant's trial counsel's recommendation that defendant accept the plea did not amount to inadequate representation. In the first trial, defendant was convicted of possession of marijuana and the jury deadlocked on the assault charge, 11 to 1 in favor of conviction. The trial court commented that the holdout juror was not candid in voir dire, implying that the chance of defendant prevailing in a second trial was very slim. Defendant's trial counsel represented that after he had defended defendant in the first trial, he realized that the People had a very strong case. Therefore, defendant's trial counsel's recommendation to accept the plea bargain of five years while he was facing a possible prison term of 13 years was reasonable. Moreover, the trial court indicated that she was familiar with defense counsel's work and that he was a competent and creative attorney.

Defendant also complains about his trial counsel's comment, "I am real nervous," made after a discussion of how long the trial court would give defendant to retain counsel. Defendant contends that the remark meant that defense counsel was reluctant to proceed to trial with defendant. It is not clear whether the remark was so meant or that defense counsel was nervous that defendant would be found guilty at trial and suffer a greater sentence than the plea offered. In any event, defendant's suspicions do not rise to the level of showing inadequate representation or an irreconcilable conflict.

In his reply brief, defendant urges that the dismissal of the charges against Jovan on the People's motion after the jury deadlocked on his assault charge demonstrates that the People likewise had a difficult case against defendant. He claims that the dismissal against Jovan shows that defendant and his trial counsel had become embroiled in an irreconcilable conflict whether to proceed to trial or to accept a plea bargain. We disagree. The evidence against Jovan may not have been as strong as the evidence against defendant. Two witnesses, who had conversed with defendant and had clear, close views of him, unequivocally identified defendant as the assailant. Our review shows that the trial court did not abuse its discretion in denying defendant's *Marsden* motion.

Defendant's citation to *People v. Munoz* (1974) 41 Cal.App.3d 62 (*Munoz*) for the proposition that the trial court erred in refusing to grant defendant's *Marsden* motion because it did not question defense counsel about his ability to be effective in the second trial does not assist him. In that case, the trial court made no inquiry of any sort to the defendant's complaint that his attorney told him he was guilty and did not have a chance. (*Munoz, supra*, at p. 66.) The court held that under the facts of that case, the trial court abused its discretion because it did not inquire into the state of mind of the attorney or attempt to ascertain in what particulars the attorney was not providing defendant with a competent defense. But *Munoz* does not require the trial court to inquire into the state of mind of the attorney in all cases. The *Munoz* decision was later interpreted that inquiry "is required only in those situations in which a

satisfactory explanation for counsel's conduct or attitude toward his client is necessary in order to determine whether counsel can provide adequate representation. Because many actions by a court-appointed attorney are justifiable, tactical decisions, it is not necessary for the trial judge to engage in a *Munoz* inquiry every time a defendant requests a substitution." (*People v. Penrod* (1980) 112 Cal.App.3d 738, 747; *People v. Young* (1981) 118 Cal.App.3d 959, 966.)

Here, the trial court attempted several times to elicit a response from defendant regarding why he believed his trial counsel was not representing him adequately. Defendant simply did not have an answer. Defense counsel had expressed to the trial court his view that defendant should accept a plea in light of his experience and the People's evidence presented in the first trial. Defense counsel did not indicate that he had any conflict with defendant. We conclude that the trial court did not abuse its discretion in failing to inquire into defense counsel's state of mind and denying defendant's *Marsden* motion.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST